SUPREME COURT, U. S.
DEC 29 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 923

JEFFERSON CONSTRUCTION CO. OF FLORIDA,
a Florida corporation,

Petitioner,

—vs.—

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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CODE OF FEDERAL REGULATIONS (CFR)

The first edition was the 1949 Edition issued under Executive Order 9930, 4 February 1948, 13 F.R. 519, of which this Court is required to take judicial notice 3, 5, 12

There have been numerous Law Review Articles published dealing with Government contracts—Judicial Review, etc., the latest of which is the Spring Issue 1966 of the Duke Law Journal, page 372, et seq., "The Court of Claims and The Wunderlich Act: Trends in Judicial Review 4, 6, 9, 12, 15

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—vs.—

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above-entitled case on 15 July 1966, rehearing denied 14 October 1966 (Tr. 335, 343 & 372).

Opinions Below

The opinion and decision of the United States Court of Claims rendered on 15 July 1966, rehearing denied 14 October 1966, has not yet been reported. A copy of such decision is appended hereto as *Appendix I*, page 19.

Jurisdiction

The judgment of the United States Court of Claims was rendered on 15 July 1966 (Tr. 335). Within season, plaintiff filed its petition for rehearing addressed thereto. On 14 October 1966 said petition for rehearing was denied by said Court (Tr. 372).

Jurisdiction of this Court is invoked under Title 28 U. S. C., Section 1255(1).

Questions Presented

I.

Must the contractor under a Government Civil Works Project Contract (Standard Form 23) assume and bear the loss due to faulty and misleading Government drawings upon which invitations were solicited and which formed an integral part of the contract, on the theory that the contractor, when bidding, as a matter of self-protection, should have detected and ascertained such errors before bidding, notwithstanding:

(a) The invitation to bid contained no provision, as it does in many instances,* allowing the bidder during bidding time to seek from the Contracting Officer clarification and correction of the documents upon which bids were solicited.

(b) The invitation to bid contained an express reservation for the benefit of the Contracting Officer, which authorized revisions and changes in the bidding documents before reception of bids, but provided:

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* *Beacon Construction Company of Mass.* v. *U. S.*, 314 F. 2d 501, 161 Ct. Cl. 1, 10 May 1963; *Thompson Ramo Wooldridge Inc.* v. *U. S.*, 361 F. 2d 222, Ct. Cl., 13 May 1966—3 years after the *Beacon* case.

> "* * * If the revisions and amendments are of a nature which requires material changes in quantities or prices bid or both, the date set for opening bids may be postponed by such number of days as in the opinion of the District Engineer will enable bidders to revise their bids * * *."

A like provision was included in the contract that was involved in *Kaiser Industries Corporation* v. *U. S.*, 340 F. 2d 322, Ct. Cl. 22 January 1965, and apparently involved in *C. J. Langenfelder & Son, Inc.* v. *U. S.*, 341 F. 2d 600, 169 Ct. Cl. 480, 11 June 1965.

(c) The Court of Claims adjudicated that the contract drawings upon which invitations were solicited were grossly faulty, erroneous and misleading, and that the Contracting Officer had knowledge of such errors before accepting bids.

(d) Procurement Rule 41 CFR 1-2.101 (Volume 2, 41 U. S. C., p. 407) prescribed as the first "basic step" required to be taken by the Government, the following:

> "Preparation of the invitation for bids, describing the requirements of the Government *Clearly, Accurately* and *Completely*, * * *."

(e) Each bidder was, under Procurement Rule 41 CFR 1-2.301 (Vol. 2, 41 U. S. C., p. 421), required to submit his bid completely responsive to and in conformity with all the details shown on the contract drawings. Otherwise his bid would not be considered.

(f) The Court of Claims in its decision held

> "Perhaps the Contracting Officer, at this juncture, could have admitted his error and readvertised the contract with corrected drawings" (App. I, 26, 27).

Observe that the Commissioner's report, which was adopted by the Court, used this language:

> "Perhaps the ethical thing for the Contracting Officer to have done at this juncture would have been to admit his error and readvertise the contract with corrected drawings" (Tr. 242).

The change in the foregoing sentence was the only change made in the Commissioner's findings.

II.

What is the Scope of Review of the decision of the United States Corps of Engineers Board of Contract Appeals (herein called Eng. BCA) by the Court of Claims under APA (Administrative Procedure Act of June 11, 1946 [App. III], and the Wunderlich Act of May 11, 1954 [App. IV]), when the Eng. BCA held that the contract drawings and Specs (specifications), construed together, contained sufficient data to alert a prudent bidder of lurking danger due to faulty drawings? Is the construction and interpretation of the contract drawings one of fact, or of law? If one of fact, was it subsumed* in the larger question of the construction of the contract documents?

> "Fact is fact and law is law,
> and never the twain shall meet;
>
> Yet which is which and what is what,
> escapes e'en law's elite."
>
> (An oft-quoted famous parody)

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* The word "subsumed" was used by the Court of Claims in a decision cited in the instant case, *WPC Enterprises, Inc.* v. *U. S.*, 323 F. 2d 874, 163 Ct. Cl. 1, Decided January 24, 1964.

Is the question, whether the contract documents contain sufficient data to have warned and alerted a bidder, before bidding, of the errors, defects and misrepresentations contained in the contract plans, a question of law and not one of fact?

III.

Must a person undertaking to bid on a Government contract to be awarded on competitive advertised bids fortify himself with a staff of experts for the purpose, during the short bidding period (two weeks allowed in the instant transaction), of scrutinizing and checking the bidding documents prepared by the Government in order to ascertain the correctness vel non of every detail? Does not the bidder on a Government contract to be awarded on competitive bidding have a right to rely on the Government's expertise preparation of the contract documents? Is refusal to bid the only alternative for a bidder when the Government's drawings are faulty?

Is the Government's invitation to bidders to be treated as containing an implied or hidden warning (bidder beware), as to accuracy, adequacy and reliability of the contract documents and representations shown thereon?

IV.

What is the Scope of Review of a Court, as distinguished from an Administrative Agency, under the standard "Disputes Clause" prescribed by Procurement Rule 41 CFR, "Contract Clauses", Section 1-7.101-12, "Disputes" (Volume 2, 41 U. S. C., p. 541), when a controversy arises due to faulty and misleading contract drawings prepared by the Government, upon which the bidder to his detriment relies?

Statutes Involved

(a) Administrative Procedure Act (APA), Chapter 324, Public Law 404, 79th Congress, Second Session, 60 Stat. 237, approved 11 June 1946, effective three months thereafter, 5 U. S. C. A., Sections 1001 et seq. Section 10(e) of the Act, which is Section 9(e) of 5 U. S. C. A., Section 1009(e). A copy of said Act is to be found in *Appendix III.* The Legislative History and Congressional Comments on this Act are to be found in U. S. Code Congressional Service, 79th Congress, Second Session, page 1195, et seq.

(b) Wunderlich Act, Chapter 199, Public Law 356, 83rd Congress, Second Session, 68 Stat. 81, enacted 11 May 1954, 41 U. S. C. A., Section 321, 322. A copy of this statute is to be found in *Appendix IV.* The Legislative History and Congressional Comments concerning this Act are to be found in Volume 2, U. S. Code Congressional and Administrative News, 83rd Congress, Second Session 1954, page 2191 et seq.

Statement of the Case

Attached to the Petition filed in the Court of Claims were six exhibits which contained all the basic documents necessary for the measuring of the obligations and rights of the respective parties. In the Answer filed by the Government, these were admitted. Hence it is not necessary to look beyond these exhibits for the determination of the nub of the controversy—the construction and interpretation of the contract documents.

For convenience and as a summary, these exhibits are:

Exhibit No.	Description	Number of pages	Transcript of Record (Tr.) Page
1	INVITATION FOR BIDS, dated Wednesday, 7 December 1960, returnable 11 a.m., EST, Thursday, 22 December 1960	11	Tr. 23
2	SPECIFICATIONS for Construction of Herbert Hoover Dike—Levee 49 and Levee 60	73	Tr. 80
3	DRAWINGS—Levee 49, Sheets 1 to 8, Sheets 2, 3, 4 amended 12-13-60 Sheet 7 amended 12-21-60	8	Separate—not numbered
4	AMENDMENTS 1, 2 and 3 to Invitation for Bids, December 13, 14, 15, 1960	7	Tr. 35
5	BID, submitted on or before December 22, 1960	5	Tr. 42
6	CONSTRUCTION CONTRACT — Executed by plaintiff on Friday, 13 January 1961; executed by Government and mailed to plaintiff on Friday, 30 December 1960	22	Tr. 47

From the foregoing it is made to appear that on 7 December 1960 the Corps of Engineers issued invitations for competitive bids due at 11 a.m., 22 December 1960, for the construction of Levee 49 Herbert Hoover Dike, Lake Okeechobee, Florida, and other works, which described the same as follows:

> "* * * constructing about 7.65 miles of new levee, with a continuous borrow canal* on its land side and islands for later tree planting along the lake side * * *" (Exhibit 1, Tr. 24).

The invitation did not include the usual clause—that, if the bidder was in doubt as to the meaning of the language

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* It is to be observed from the contract drawings, especially Sheets 3 and 4, that the expression "continuous borrow canal" is not used, but instead there is used the expression "continuous borrow pit". The word "canal", used in the contract proper, had a meaningful purpose, for that the project embraced a drainage plan as well as a dike plan.

employed, he could before making a bid seek from the Contracting Officer a clarification or explanation. No explanation was ever given for the omission of this provision. The invitation did however contain an unusual reservation quoted in I-(b) of "Questions Presented", *supra*. Nor did the invitation contain the usual provision requiring all bidders to examine the site and fully familiarize themselves with the conditions thereof. Such a provision was however included in General Condition 3 of the Specs, page 22. An examination of the site was of no help to the bidder in determining the meaning of the language employed in the contract documents.

The invitation to bid was supported by 8 large sheets of drawings or plans, which were not schematic, but actually detailed designs of the work to be done. Also a part of the invitation were Specs consisting of 73 pages.

As stated *supra*, by express commands of the CFR and FPR, the drawings and Specs were required to depict the work to be done, "*clearly, accurately* and *completely*".

Petitioner within season made the bid, which was accepted by the Government, and a contract was awarded to it (Exhibit 6). This was signed by the Government on 30 December 1960 and by the contractor on 13 January 1961. The contract was on Standard Form 23. Attached to the contract were "General Provisions" on Standard Form 23A. These were printed, and on the face of many of the same were the stamped words,

"REVISED

See Paragraph 27"

Article 3, "Changes", and Article 4, "Changed Conditions", were not revised, but Article 6, "Disputes", was changed. The "Disputes Clause", "for civil works contract", was

identical with the Standard "Disputes Clause" promulgated by CFR. (Vol. 2, Title 41 U. S. C., p. 541, 41 CFR, Section 1-7.101-12.) This "Disputes Clause" is geared both to the Wunderlich Act and APA, quoted in Appendix III and IV.

The contractor began the work and completed the same within the time prescribed by the contract. During the course of the construction work, the contractor discovered that Sheets 3 and 4 of the Government's contract drawings were not only erroneous and faulty, but very misleading and negligently prepared in that they showed the bottom width of the continuous borrow pit to be only one-half the size of that actually needed to obtain the fill for the construction of the designed levee. This required the contractor to procure additional heavy equipment and rehandle the excavated material in order to cast the dredged material to the crown of the levee. This error in Sheets 3 and 4 of the plans, which was not detectable by fair and reasonable reading and interpretation of the same, increased the contractor's cost $297,222.93, for which it sought additional compensation under the "Disputes Clause" of the contract. Both the Contracting Officer and the representative agency of the Secretary, to-wit: Corps of Engineers, Board of Contract Appeals, known as Eng. BCA, denied the contractor relief. Such denial was on the basis that the contract drawings were not faulty, erroneous or misleading, although the Government admitted that the contractor was required to increase the size of the continuous borrow pit to a bottom width of twice that shown on the plans in order to obtain sufficient dredged materials to build the levee to the height and width required. A copy of the decision of Eng. BCA is appended hereto as *Appendix II* (Tr. 69).

Thereupon, on 3 March 1965 the contractor brought an action in the Court of Claims seeking such recovery. The Government on 16 June 1965 filed its answer denying that

the contract plans were faulty and contending that the decision of the administrative agency, Eng. BCA, denying recovery was one of fact and not of law, and hence final.

Both sides moved for summary judgment. The Government supported its motion for summary judgment with the entire record of the Eng. BCA. On 15 July 1966 the Court of Claims rendered a decision (Appendix I) denying the contractor relief, holding that the Government's plans were faulty, erroneous and misleading to a degree that such defects were glaring and obvious to any prudent bidder bidding on the project. This being true, the bidder could have protected itself by declining to bid—absent any provision in the invitation for a correction of the errors prior to bidding time. The Commissioner to whom the case was referred used the following sentence in his report:

> "Perhaps the ethical thing for the Contracting Officer to have done at this juncture would have been to admit his error and readvertise the contract with corrected drawings", (Tr. 233 at 242).

which sentence was changed by the Court of Claims to read as follows:

> "Perhaps the Contracting Officer, at this juncture, could have admitted his error and readvertised the contract with corrected drawings" (Tr. 335, at 341).

The heart of the controversy is to be found in Sheets 3 and 4 of the drawings (Exhibit 3). For ready reference there is attached hereto a copy of that portion of Sheet 3 bearing directly on the problem, as *Appendix V*, page 43. It shows in detail the levee which had been designed. It shows the berm and "required continuous borrow pit". The legend underneath the continuous borrow pit refers the reader to "Profile", which is to be found on Sheet 4. Sheet

4 gives in detail the "bottom width of the continuous borrow pit" at numerous stations during the 7.65-mile levee and canal. The Profile discloses that the bottom width of the continuous borrow pit over the entire 7.65 miles ranges from 60 feet to 100 feet. This corresponded with the design of the "continuous borrow pit" shown on Sheet 3. Both the Eng. BCA and the Court of Claims found that Sheets 3 and 4 showed a variation of the bottom width of the continuous borrow pit to range from 60 feet to 100 feet. As stated supra, actual construction required the contractor to extend the bottom width of the continuous borrow pit to twice that shown on Sheets 3 and 4, or over 200 feet. This compelled the contractor to handle the material twice, instead of once, and also required it to provide larger and heavier machines. The net result was that it increased the cost almost $300,000.00 over and above the bid or contract price. The Court of Claims in denying the contractor relief (Appendix I) held:

(1) That the plans and drawings were faulty, misleading and negligently prepared by the Government.

(2) That the Government knew of the errors in the drawings before acceptance of bids.

(3) That the Government, well knowing of the faulty drawings, elected to gamble, relying on a certain provision in the Specs as an exculpatory clause, quoted on page 4 of the decision, which provision is also to be found on page 44 of the Specs. This conclusion of the Court of Claims was grounded on the second sentence,

> "Embankment materials available in the required *cross section** of the continuous borrow pit, as shown on the

* By the use of the words "cross section" in the Specs, the Government further confirmed that what was shown on Sheet 3 was actually a design in detail, which proved during the construction work to be twice the width shown on said drawings.

drawings, are estimated to be less than the amount required to build the levee."

This emphasis on the second sentence ignored the third sentence, which qualified the second sentence. It is

"* * * additional levee fill required shall be obtained by extending the excavation as *indicated on the drawings*".

The third sentence directed the reader to Sheets 3 and 4 for the ultimate solution of the bottom width of the continuous borrow pit. As stated before, Sheets 3 and 4 showed this to be only one-half of what was actually required.

(4) That Eng. BCA had found that the contract drawings contained within themselves sufficient data with which to enable the bidder to detect the errors contained in the Government's plans, before bidding. Such finding was one of fact and not of law, and hence final under both APA and Wunderlich Act. The Court said,

"* * * The Board finding that the plaintiff could have ascertained the borrow pit width by a mathematical analysis of data in the contract documents must, therefore, be accepted as unchallenged * * *" (App. I, p. 25).

(5) Nothing was said in the decision concerning the applicability vel non of Article 3 "Changes" and Article 4 "Changed Conditions" of the General Provisions, which were standard provisions included in the contract (Exhibit 6). It may be that these Articles were not designed or intended to embrace faulty Government drawings and specifications.

(6) Nothing was said in the decision about the commands of the Code of CFR and FPR requiring the Government's drawings and Specs, upon which bids were invited, to

"clearly, accurately and *completely"* depict the work upon which bids were solicited. This command originated in 1959 by the General Services Administration, which was created as a result of Legislative Act of 30 June 1949 (Eff. 1 July 1949, 63 Stat. 379, 5 U. S. C. 630). It is the belief of the petitioner that the instant case is the first case which involves the breach or disregard by the Government of the above regulatory command touching construction work under the competitive bidding process. The absence of reported judicial decisions touching the above Regulation may be explained in part by the fact that it did not come into existence until *ca* 7 years ago, and hence was not in force at the time of the rendition of decisions prior to the present decade.

Jurisdiction of Court Below

The jurisdiction of the Court of Claims was grounded on 28 U. S. C. 1491 (claim founded on an express or implied contract). Notice of this statute and related statutes was taken in Paragraph 9 of the Petition (Tr. 20).

Reasons for Granting the Writ

The Court of Claims has decided an important question of Federal law relating to Government construction contracts procured through the process of competitive bidding, which, if allowed to stand, will have the effect of

(1) Deterring absolutely all competitive bidding on Government contracts, because of the risks imposed on the contractor due to faulty drawings and specifications prepared by the Government, or

(2) Resulting in increased cost of construction work due to the inclusion in the bid submitted of a "cushion" to

absorb any hidden defects contained in the Government's drawings and Specs.

The Court of Claims has decided a question of Federal law which is in conflict with:

(1) Decisions of this Court, such as:

About 91 years ago this Court said in the case of *Cooke* v. *United States,* 91 U.S. 389, 23 L.Ed. 237, decided 29 November 1875, that when the United States

> "* * * comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there."

This principle has been followed in a long undeviating line of decisions and expanded to include the principle that in construction contracts the Government is liable to the bidder and contractor for all loss sustained due to errors in the representations made by the Government in the invitation to bid and contract documents as to the nature, extent, quantity and quality of work to be done.

U. S. v. *Utah Stage Co.,* 199 U.S. 414, 26 S.Ct. 69, 50 L.Ed. 251, Decided 27 November 1905, Affd. 39 Ct.Cl. 420;

Hollerbach v. *U. S.,* 233 U.S. 165, 34 S.Ct. 553, 58 L.Ed. 898, Decided 2 April 1914, Rev. 47 Ct.Cl. 236;

U. S. v. *Smith,* 256 U.S. 11, 41 S.Ct. 413, 65 L.Ed. 808, Decided 11 April 1921, Affd. 54 Ct.Cl. 119;

Freund v. *U. S.,* 260 U.S. 60, 43 S.Ct. 70, 67 L.Ed. 131, Decided 13 November 1922, Rev. 56 Ct.Cl. 15;

U. S. v. *Rice,* 317 U.S. 61, 63 S.Ct. 120, 87 L.Ed. 53, Decided 9 November 1942, Rev. 95 Ct.Cl. 84.

See also the late decisions dealing with the Wunderlich Act,

U. S. v. *Bianchi & Co.,* 373 U.S. 709, 83 S.Ct. 1409, 10 L.Ed.2. 652, Decided 3 June 1963, Rev. 157 Ct.Cl. 432, 169 F.Supp. 514 with Annotation 10 L.Ed.2. 1207;

U. S. v. *Utah Construction & Mining Company,* 384 U.S. 394, 86 S.Ct. 1545, 16 L.Ed.2. 642, Decided 6 June 1966, Rev. 168 Ct.Cl. 522, 339 Fed.2. 606;

U. S. v. *Anthony Grace & Sons, Inc.,* 384 U.S. 424, 86 S.Ct. 1539, 16 L.Ed.2. 662, Decided 6 June 1966, Rev. 170 Ct.Cl. 688, 345 Fed.2. 808.

(2) Decisions of the Courts of Appeal and the District Courts, such as

Kayfield Construction Corp. v. *U. S.,* 278 Fed.2. 217 (CA 2), Decided 5 May 1960;

Eastern Service Management Company v. *U. S.,* 243 Fed.Supp. 302 (D.Ct., S.C.), Decided 8 July 1965;

U. S. v. *Pickett's Food Service,* 360 Fed.2. 338 (CA 5), Decided 6 May 1966;

(3) Decisions of the Court of Claims, such as

Fehlhaber Corp. v. *U. S.,* 151 Fed.Supp. 817, 138 Ct.Cl. 571, Decided 5 June 1957, Cert.Den. 355 U.S. 877, 78 S.Ct. 141, 2 L.Ed.2. 108, Decided 18 November 1957;

Beacon Construction Co. of Mass. v. *U. S.*, 314 Fed.2. 501, 161 Ct.Cl. 1, Decided 10 May 1963;
WPC Enterprises, Inc. v. *U. S.*, 323 Fed.2. 874, 163 Ct.Cl. 1, Decided 24 January 1964;
Kaiser Industries Corp. v. *U. S.*, 340 Fed.2. 322, 169 Ct.Cl. 310, Decided 22 January 1965;
C. J. Langenfelder & Son, Inc. v. *U. S.*, 341 Fed.2. 600, 169 Ct.Cl. 480, Decided 11 June 1965;
Blount Bros. Const. Co. v. *U. S.*, 346 Fed.2. 962 171 Ct.Cl., Decided 11 June 1965;
C. J. Montag & Sons, Inc. v. *U. S.*, 348 Fed.2. 954, 172 Ct.Cl., Decided 16 July 1965;
Thompson Ramo Wooldridge Inc. v. *U. S.*, 361 Fed.2. 222, Ct.Cl., Decided 13 May 1966.

On the day the Court denied plaintiff's petition for rehearing in the instant case (14 Oct. 1966, Tr. 372), the same Court decided a case diametrically opposite to its decision in the instant case. *Kraus* v. *United States* (14 Oct. 1966), 366 Fed.2. 975, included in the 5 December 1966 Advance Sheet.

The Court of Claims has decided a question of Federal Law—holding that all bidders on Government construction projects, pursuant to competitive bidding, must assume the risk and stand the loss occasioned by faulty drawings and Specs prepared by the Government, concerning which the bidder is helpless to correct. Such a decision is violative of all decisional law holding without retreat that the bidder has the right to rely upon the representation made by the Government in its invitation for competitive bids. If this decision is allowed to stand, it will have a disastrous impact upon the entire construction program of the Government, for that no bidder will dare to bid (nor can he afford to do so) upon an undertaking so fraught with hidden perils created by the Government.

Moreover, this case involves numerous principles of law relating to Government contracts, which have been ignored and disregarded in the decision under review, but which ought to be decided by this Court so that both the contractor or bidder, as well as the Government, may know their duties, obligations and rights under such construction contracts, such as "estoppel by negligence"—the Government admittedly negligent in the preparation of its drawings and Specs, ought not to escape liability therefor when the result will be that an innocent party must suffer. Is the Doctrine of "Unjust Enrichment" to be applied in Government contracts—shall the Government be allowed to be enriched unjustly through its own fault by making the contractor bear the loss occasioned by such fault on the part of the Government?

CONCLUSION

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

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